IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES,
Petitioners,

vs.

ALFRED H. MAYER COMPANY, A CORP., ALFRED REALTY COMPANY, A CORP., PADDOCK COUNTRY CLUB, INC., A CORP., AND ALFRED H. MAYER,
Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT.

BRIEF OF THE AMERICAN FEDERATION OF TEACHERS AND MINNESOTA FEDERATION OF TEACHERS, AFL-CIO, AMICI CURIAE.

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INTEREST OF AMICI.

This brief is filed on behalf of the American Federation of Teachers, a federation of teachers' unions with a membership of more than 150,000, and the Minnesota Federation of Teachers, one of its state affiliates. The American Federation of Teachers is affiliated with the American Federation of Labor, Congress of Industrial Organizations (AFL-CIO).

The American Federation of Teachers is vitally inter-

ested in the outcome of this case, for *de facto* segregation in housing bears a direct relationship to *de facto* segregation in educational facilities. The Negro child, who is forced to live in the Negro ghetto in any city because his parents are prevented solely on the basis of their race from procuring housing in "white" neighborhoods, is forced to attend what are, in fact, segregated public schools. That the segregation of children in public schools solely on the basis of race deprives such children, *both* Negro and white, of equal educational opportunities is well settled. The members of the American Federation of Teachers then are interested here not only because of a commitment to the eradication of racial injustice, but more directly because of a commitment to the improvement of public education in the United States. The decision reached in this case will directly affect that vital interest and, concomitantly, the well-being of our members.

The American Federation of Teachers and the Minnesota Federation of Teachers hope that the filing of this brief will aid the Court in reaching its decision in this case. Letters of consent are filed herewith.

ARGUMENT.

I. INTRODUCTORY STATEMENT.

Plaintiff-petitioner adequately states the facts and nature of this case. The issue was phrased by the District Court, as follows:

> "[T]he issue is whether the willful refusal of an owner of private property who is developing a private subdivision thereon to sell a part of his property to a Negro solely because of race entitles the person so discriminated against, under any presently applicable federal law, either to damages or to a mandatory injunction or both." *Jones* v. *Alfred H. Mayer Co.*, 255 F. Supp. 115 (E. D. Mo., 1966).

It should be noted that, as Judge Blackmun stated below,

> "This case comes *close* to raising nakedly the question whether, in the absence of federal and state open housing legislation, an owner of a home, which is on the market for sale, may refuse to sell that home to a willing purchaser merely because that purchaser is a Negro." *Jones* v. *Alfred H. Mayer Co.*, 379 F. 2d 33, 34 (8th Cir., 1967) (Emphasis supplied).

Appellees will undoubtedly argue that this *is* the issue before the Court and that the decision herein will directly and significantly affect the disposition of *all* privately-held real property. If this were the issue, the position of the American Federation of Teachers would still compel it to appear in support of the appellants. However, such is *not* the case. The issue, confined by the facts herein, is whether 42 United States Code § 1982 prohibits discrimination in private subdivision housing.

> "Whatever the ultimate results of the cases that will be presented to the Court under the fourteenth amend-

ment, they should flow from consideration of the problems presented, not from a formula that ignores them." Lewis, "The Meaning of State Action," 69 *Colum. L. Rev.* 1083 (1960) at 1121.

We, therefore, ask the Court to consider the presentation of the issues herein as viewed by the American Federation of Teachers.

The decision of the Eighth Circuit Court of Appeals approached the issue on three different bases: the Thirteenth Amendment; the Fourteenth Amendment; and relating a private subdivision to a governmental function. We shall discuss all three in this brief.

II. THE COURT OF APPEALS WAS UNNECESSARILY RESTRICTIVE IN ITS INTERPRETATION OF THE THIRTEENTH AMENDMENT.

The Eighth Circuit considered the application of the Thirteenth Amendment to this case and decided that the "wrong" suffered by plaintiffs was not a "badge of slavery." Therefore, the Thirteenth Amendment did not provide a solution; nor did 42 U. S. C. 1982 if that law were based upon the Thirteenth Amendment.

Admittedly the law holding that the Thirteenth Amendment and any implementing legislation can apply to individual's acts of discrimination is sparse. *United States* v. *Morris*, 125 Fed. 322 (E. D. Ark., 1903). Yet we contend that a historical analysis of the Thirteenth, Fourteenth and Fifteenth Amendments and the civil rights legislation of the Reconstruction era reveals that the overall aim of these enactments was destruction of the social structure as it existed prior to the Civil War. The Negro was to be treated no differently than the white. One of the rights now given to the Negro was the right to property with all its attributes—ability to buy, sell, lease, etc.

The Circuit Court of Appeals recognized this right but held that this right was very different from a right to specific property. The distinction is well-taken, but a right is nothing but a word until it is actually enjoyed. The right to property can be realized only in specific property. If that is categorically denied to Negroes, they can hardly be said to have the right to property. Their denial is directly attributable to their color; their color is tied up in the caste system present before the Civil War. Continuing an attribute of that system continues the system itself.

We note that the Thirteenth Amendment gives Congress the power to implement the removal of slavery. Such legislation, we contend, can go far beyond the mere prohibition of slavery. It can aim at the removal of attributes of slavery—one of which was the inability to own property. This legislation can prohibit acts of individuals, for the Thirteenth Amendment acts directly against individuals. 42 U. S. C. 1982, we contend, can find its validity in the Thirteenth Amendment. Plaintiffs can find relief against defendants under the legislation.

III. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE "STATE ACTION" FOR ITS APPLICATION.

When considering the application of the Fourteenth Amendment to the instant case, two questions immediately arise: 1) Is state action an essential requirement for the application of the Fourteenth Amendment? 2) If so, was there state action in the instant case?

Ever since 1883, the *Civil Rights Cases*, 109 U. S. 3, courts considering application of the Fourteenth Amendment have demanded that state action be present. However, opinion in recent cases indicate that section 5 of the Fourteenth Amendment may authorize the federal government to act against individuals who deny to others the

rights covered by the Fourteenth Amendment. Mr. Justice Brennan expressed this opinion in *United States* v. *Guest*, 383 U. S. 745 (1966) (concurring opinion), when he said the Fourteenth Amendment reached private conspiracies to interfere with equal utilization of state facilities.

This view is analogous to the application of the Fifteenth Amendment in voting cases. In *Terry* v. *Adams*, 345 U. S. 461 (1963), the Jaybird Association was a private organization. Yet its choice of candidates was decisive as to who appeared on the ballot. The Court applied the Fifteenth Amendment to the situation and found the exclusion of Negroes from the association and its voting procedures to be unconstitutional. This decision followed *Smith* v. *Allwright*, 321 U. S. 649 (1944), which imposed a duty upon the state to see that its voting procedures were not discriminatory. In a sense, state inaction qualifies as state action for certain purposes of the Fifteenth Amendment.

Summarizing this line of thought, it might be said that when an individual or group of individuals acts to prevent another from access to the exercise of rights protected by the Fourteenth Amendment, action can be brought against such individuals.

It is relatively easy to apply this theory to the facts of the present case. For example, the complaint states that those children living in defendants' development will have access to public schools. Considering the fantastic growth of such suburban developments and of modern high-rise city apartments, exclusion of Negroes from such large-scale housing will force Negroes to find housing in the traditional Negro ghettoes of our large cities. The opportunity for equal education simply does not exist if the "neighborhood school" is the policy followed by the school district. The inner city or ghetto schools do not provide

an equal opportunity for an adequate education compared to suburban schools where the expenditure per student is usually much higher than that per student in inner city. Yet most state constitutions impose upon the state legislatures the duty to provide a good education for *all*. Equal opportunity to education is also imposed by the United States Constitution.

The Fourteenth Amendment simply should not tolerate individual acts which deny equal opportunity in education to Negroes. The act of defendant, if allowed to stand, will deny just that opportunity to Negro children.

Section 5 of the Fourteenth Amendment is capable of three interpretations; the federal government can act against individuals 1) if their acts deny equal utilization of state facilities to an individual; 2) if the practical effect of the private act is great; 3) if their acts discriminate.

We have discussed the "equal utilization" theory at length. The "effect" theory is closely related to equal utilization and was hinted at in *United States* v. *Guest*, 383 U. S. 745 (1966), and in *Reitman* v. *Mulkey*, 387 U. S. 369 (1967). This theory demands that the court measure the effect of the individual's private acts. Referring once again to the problem of education, it can be easily seen that refusal to sell to Negroes by a developer of a subdivision of one thousand houses has quite a different effect than refusal to sell by one owning just one house. The former party may sell thousands of houses over the years while the individual homeowner may sell only once in ten years.

The problem with this approach is the application of quantity to rights which are normally thought of as qualitative. As to the individual Negro denied housing, it matters little to him whether a developer or a homeowner refuses to sell. Clearly, both situations are equally as objectionable under the Constitution. Nevertheless, under

the facts herein, the seller is a developer of subdivisions. The practical effect of his discrimination, and that of others in his position, is staggering.

The third interpretation of Section 5 would be to apply the Fourteenth Amendment to all individual acts and would directly overrule the *Civil Rights Cases.* Judge Blackmun's analysis of the development of the "state action" concept, *Jones* v. *Alfred H. Mayer, supra,* at 379 F. 2d 40-42, did not lead to such a result *only* because of his position on an inferior court. We submit that his analysis of the opinions of this Court compels a decision holding that Section 5 applies to all individual acts.

We respectfully submit that the application of the Fourteenth Amendment does not require "state action" and that, therefore, appellants may maintain this action under 42 U. S. C. § 1982.

IV. IN ANY EVENT THERE IS SUFFICIENT STATE ACTION IN THE CASE AT BAR TO REQUIRE APPLICATION OF THE FOURTEENTH AMENDMENT.

If this Court holds that state action is a vital component of application of the Fourteenth Amendment, we must proceed to an examination of the concept of state action. This concept is ambiguous; in fact, the "equal utilization" and "effect" theories discussed above could be included in an expanded concept of state action.

Since *Buchanan* v. *Warley,* 245 U. S. 60 (1917), it has been understood that the state cannot impose racial restrictions on property. *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), made it clear that an individual cannot employ state machinery to enforce a restrictive covenant where there is a willing seller and a willing buyer. State action in *Shelley* v. *Kraemer* is clear. But this does not provide an answer in the instant case without further analysis which

must bear in mind that state action need not be exclusive or direct, *United States* v. *Guest*, 383 U. S. 745 (1966).

By one approach there are two types of state action: 1) a private individual performs a governmental function; 2) a state official or agent is involved in private activities.

The perfect example of the first type of state action was presented in *Marsh* v. *Alabama*, 326 U. S. 501 (1945), where a corporation performed all the functions of a municipality. The court had no trouble holding that the rights secured under the First and Fourteenth Amendments applied to actions by private individuals.

State action in this context is in reality inaction. If this Court views this situation as the Eighth Circuit did, states could easily escape responsibility under the Fourteenth Amendment by simply abdicating their traditional roles and functions.

In the instant case plaintiffs alleged this type of situation —*e.g.* defendant was to perform the normal municipal functions such as the building of streets. The Court dismissed this by saying this was state inaction and did not qualify under the Fourteenth Amendment. This flies directly in the face of the reasoning of *Marsh* v. *Alabama*, 326 U. S. 501 (1945).

The complaint also alleged the second type of direct state action. Plaintiffs pointed out that defendants were incorporated by the state; that building and zoning codes, banking and lending laws and statutes and common law governing the transfer of property affected defendants' acts and were used to the benefit of the defendants in the building of their development. Defendants have no untrammeled freedom to operate their business in any manner that they choose. For example, building codes regulate architectural plans. The final plans are all subject to approval of the county commission. In addition, it would seem that state

financial aid to the public schools which must be built to accommodate subdivisions such as this is an example of direct state action which will be needed in the future.

The Circuit Court of Appeals apparently considered only the corporate licensing of defendants and dismissed this as insignificant and neutral state action. That is, the act of the state was not sufficient to make the Fourteenth Amendment applicable. Without the benefit of *all* of the state acts and laws listed in the complaint, defendants' business enterprise would not have existed. Applying a test from the tort field, "but for" the state's acts defendant could not have been able to build its development and, hence, to discriminate against plaintiffs.

The concept of state action can also be viewed in a different light. There may be a great amount of direct state action. Yet this may have little effect upon the actual denial of rights. On the other hand, there may be a small amount of indirect state aid which may have a great effect upon the denial of rights. We contend that there is enough state action in the present case to justify a decision for plaintiffs. A decision for defendants would adversely affect a large segment of the American public.

One peculiar aspect should be noted about the opinion of the Circuit Court of Appeals. The Court said relief for these plaintiffs lay in *proper* legislation—the Court did not say *state* legislation. The Court could be referring to state or federal legislation. What the Court implies is that such legislation could find validity in the Constitution as it stands today. If that is true, why cannot 42 U. S. C. § 1982 survive on the same Constitutional basis? The Court did not find that 1982 was improperly drawn nor that it was unconstitutional.

The only other interpretation of this aspect of the opinion was reviewed in "Recent Decisions," 56 Ill. Bar Jour.

402 (Jan., 1968). The Court could have meant it would look to the legislation itself to decide if there were state action. This begs the essential question of state action by turning the answer over to those who pass the legislation. The determination of state action can hardly be incorporated into the statute that relies for its validity on state action.

CONCLUSION.

The Thirteenth, Fourteenth and Fifteenth Amendments demonstrated an intention to eradicate the social system which existed before the Civil War. The right to purchase property based upon financial ability and without regard to race should be considered one of the effects of those constitutional changes. With this in mind we suggest that the Court can readily find authority for section 1982 of the Civil Rights Act.

Respectfully submitted,

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